No. 83-747

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY,
Petitioner,

v.

PAUL D. JOHNSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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1. In its Petition, WMATA demonstrated that the decision by the District of Columbia Circuit was in error for a variety of reasons: it misread the plain language of LHWCA Section 904(a), disregarded the *quid pro quo* nature of workers' compensation legislation, including the LHWCA, and leads to several absurd results Congress plainly could not have intended. The Commonwealth of Virginia and the State of Maryland, the two state signatories to the interstate compact under which WMATA was created, and the Association of Minority Contractors have filed *amicus* briefs agreeing with WMATA that the decision below is plainly in error and will inevitably produce the harmful consequences WMATA has forecast. Respondents' answer to these arguments is

to rely upon lower federal court decisions having nothing in common with this case and to ignore the harmful effects of the decision below.

It is important at the outset to identify the matters to which Respondents have presented little or no reply.

(a) Nowhere in their Opposition have Respondents contended that the plain language of Sections 904 and 905(a) supports their construction, or is at all ambiguous. In fact, Respondents do not even refer to the plain language of these provisions in their Opposition.

(b) Respondents have also offered no legislative history of the original LHWCA or any of its amendments to buttress their construction of Sections 904 and 905(a).

(c) Respondents similarly do not deny that the decision below robs WMATA of the *quid pro quo* that, as this Court has often reiterated, has always been regarded as central to the soundness, and even constitutionality, of every workers' compensation program ever adopted in this Nation.

(d) Finally, Respondents have not seriously disputed that the decision below will inevitably lead to the numerous anomalous and onerous results which are set forth in the Petition and the *amicus* briefs, and which Congress plainly could not have intended.

2. Respondents' principal argument (Opp. 7-11) simply reiterates the error committed by the Court of Appeals in failing to respect the plain language of LHWCA Section 904(a). Respondents continue to press the interpretation, unsupported by any of the decisions Respondents have cited, that Section 904(a) requires a subcontractor to secure workers' compensation. As we have already pointed out (Pet. 10-14), Section 904(a) plainly requires a contractor to obtain workers' compensation for all subcontractors' employees. *Amici* Virginia and Maryland, and the National Association of Minority Contrac-

tors concur in our construction of Section 904(a). *See* Va-Md. Br. 4-5; Minority Contractors Br. 3. Because Respondents have cited nothing in the legislative history of the LHWCA or its numerous amendments to support their interpretation, the plain language of Section 904(a) is controlling and requires reversal of the judgment below.[1]

3. Respondents have sought to evade the plain language of Section 904(a) by offering three different arguments, two of which even the Court of Appeals failed to accept. None of these arguments can withstand scrutiny.

(a) Respondents' initial argument is that the WMATA Interstate Compact (*see* Pet. 5) does not require WMATA to purchase workers' compensation insurance for all Metro construction employees. That is true but irrelevant. The statute at issue is the LHWCA, not the WMATA Interstate Compact, and LHWCA Section 904(a) clearly requires a general contractor—which every court below found WMATA to be (*see, e.g., id.* at 6-7; *see also* Va.-Md. Br. 4), and which Respondents have not challenged—to purchase such insurance. Furthermore, the

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[1] Respondents have also misconstrued Question 2 of the Petition (*see* Opp. 9). The Court of Appeals accepted the concept that WMATA could be treated as a "statutory employer" under some circumstances, and thereby would be entitled to immunity from suit under Section 905(a) (*see* Pet. App. 22a). But the court ruled that WMATA was not entitled to immunity here because WMATA had adopted a wrap-up insurance program (*id.* at 21a-22a). Under the ruling below, WMATA forfeited its immunity as a statutory employer because it did not either make a futile demand that its subcontractors obtain the insurance that the insurance industry had made clear it was unwilling to provide, or await the historically-proven, near-certain default of any of its subcontractors in their effort to provide compensation coverage, with the attendant lapse in coverage for Metro construction laborers, before obtaining insurance. Neither the Court of Appeals nor Respondents have offered any reason why Congress would have intended to provide WMATA with immunity if it permits these lapses to occur but would deny WMATA immunity if it forestalls their occurrence.

WMATA Interstate Compact clearly *authorizes* WMATA to purchase workers' compensation insurance for Metro construction laborers (*see* Pet. 5). Accordingly, Respondents' contention is unavailing.

(b) Respondents' second argument—that the LHWCA does not immunize non-employer contractors (Opp. 8)—simply restates the central issue presented by the Petition. Respondents have not offered any reason why Congress would have wished to deny a contractor the immunity from suit Congress provided for in Section 905(a), while simultaneously burdening that contractor with the obligation of purchasing workers' compensation insurance under Section 904(a). And, as discussed below, none of the cases cited by Respondents supports such an anomalous proposition.

(c) Respondents' last argument in this regard (Opp. 8-9) is that WMATA's subcontractors, rather than WMATA itself, have secured compensation insurance. However, Respondents do not contest the factual finding made concurrently by each court below that WMATA *alone* purchased the compensation insurance under which each Respondent received a compensation award (*see, e.g.*, Pet. App. 49a-50a). The ruling of the District of Columbia Court of Appeals in *Edwards* v. *Betchel Assoc. Prof. Corp.*, 466 A.2d 436 (D.C. App.), *cert. denied*, No. 83-560 (Nov. 28, 1983), that WMATA's subcontractors "secured" workers' compensation insurance, simply by being listed as named insureds on WMATA's workers' compensation insurance policy, is not inconsistent with the conclusion that WMATA, who paid for that insurance, also secured compensation for Metro construction laborers.

4. Like the court below, Respondents have relied upon several earlier lower federal court decisions that are materially different from the case at hand. As we have al-

ready pointed out (Pet. 8; *see also* Va.-Md. Br. 5), *none* of these decisions ruled that a contractor, as the *sole* compensation provider, was not entitled to immunity under Section 905(a).[2] Each of these decisions ruled that a general contractor was not entitled to immunity either because the general contractor had never purchased workers' compensation insurance, or because the subcontractor had already done so (*see* note 2, *supra*; Va.-Md. Br. 5).

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[2] The Fifth Circuit expressly left open the question of whether a general contractor was entitled to immunity if it was required to pay compensation to an employee. *Probst* v. *Southern Stevedoring Co.*, 379 F.2d 763, 767 (1967).

Both the subcontractor and the general contractor had purchased workers' compensation insurance in *DiNicola* v. *George Hyman Constr. Co.*, 407 A.2d 670, 671-672 (D.C. App. 1979), and in *Thomas* v. *George Hyman Constr. Co.*, 173 F.Supp. 381, 381 (D.D.C. 1959).

In *Fiore* v. *Royal Painting Co.*, 398 So.2d 863, 864 (Fla. App. 1981), the compensation insurance purchased by the subcontractor had lapsed, and, after an employee had sustained an injury, the contractor attempted to forestall suit by voluntarily making compensation payments.

Miller v. *Northside Danzi Constr. Co.*, 629 P.2d 1389 (Alaska 1981), did not involve the LHWCA. The decision to deny a contractor immunity turned upon unique provisions of Alaska law. *Id.* at 1390-91.

Finally, Respondents' reliance (Opp. 11) upon the 1946 decision of the New York Court of Appeals in *Sweezey* v. *Arc Electrical Constr. Co.*, 295 N.Y. 306, 67 N.E.2d 369, to support their construction of LHWCA Sections 904 and 905(a) is in error. When Congress adopted the LHWCA in 1927, it modeled the Act after the then-existing New York workers' compensation law. *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 275 (1980). In 1927, New York law clearly suggested that a contractor like WMATA was entitled to immunity (*see* Pet. 14-15). Therefore, because "the relevant inquiry is not whether Congress correctly perceived the then state of the law, but rather what its perception of the state of the law was" (*Brown* v. *GSA*, 425 U.S. 820, 828 (1976); *see also Cannon* v. *University of Chicago*, 441 U.S. 677, 711 (1979)), a 1946 New York decision plainly lacks probative value as to Congress' understanding of New York law in 1927.

Indeed, in the seminal case on this matter, *Thomas* v. *George Hyman Constr. Co.*, *supra*, the court ruled that a contractor was not entitled to immunity *only* because a subcontractor had already purchased compensation insurance. 173 F. Supp. at 383. Because that is plainly not the case here, none of these decisions supports the ruling below.

5. As Virginia and Maryland have now made clear, the decision below subjects WMATA, an interstate agency, to different law in different forums (*see* Va.-Md. Br. 2-3; *see also* Pet. 17 & n.18). Under the law of Virginia and Maryland, WMATA would be wholly immune from tort suits like the ones brought here. Respondents' argument (Opp. 6-7) that Section 80 of the WMATA Interstate Compact waived WMATA's immunity from suit altogether therefore not only is plainly inconsistent with the express terms of that provision (*see* Pet. App. 43a-44a), but is also inconsistent with the understanding of the applicable law by the two state signatories to the Compact.[3]

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[3] Respondents' unsupported contention (Opp. 12) that the statute of limitations will bar most potential tort suits is plainly in error. As we have already pointed out (Pet. 18 n.20), the District of Columbia Circuit had adopted the "discovery rule" with respect to the running of the statute of limitations for latent disease cases of the type at issue here, such as asbestosis or silicosis. *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111 (1982). Under that rule, a plaintiff's cause of action does not accrue, and the statute of limitations therefore does not begin to run, until the plaintiff receives a diagnosis of the specific injury for which suit is brought. *See* 684 F.2d at 116-121 (cause of action for mesothelioma not accrued upon earlier diagnosis of mild asbestosis). Hence, WMATA is potentially liable for a variety of tort claims arising out of the silicosis claims that Respondents and other laborers like them have brought here, and, because of the decision below, WMATA has been exposed to liability for claims of this type for an unforeseeable future.

6. Respondents also argue (Opp. 11) that WMATA's wrap-up program can be maintained in effect simply by requiring the subcontractors to pay the insurance premiums demanded by WMATA's carrier. That contention displays a remarkable ignorance of a wrap-up insurance program. No insurance carrier would endorse a single workers' compensation insurance policy that will be paid by literally hundreds of independent premium payments. Indeed, WMATA adopted its wrap-up insurance program because the insurance industry had made clear its unwillingness to underwrite individual insurance policies for each of WMATA's subcontractors (*see* Pet. 21-22)—the very system Respondents have suggested. Moreover, even if some carrier were willing to underwrite such a program, all the benefits of a wrap-up (*id.* at 23 n.26) would be lost through the multiplicity of overlapping policies. Furthermore, the only equitable method for apportioning premiums among the subcontractors would be to rely upon the risk involved for each one, and that approach would resurrect the system WMATA's wrap-up program was designed to replace. And, in so doing, many subcontractors, especially minority subcontractors (*see* Minority Contractors Br. 1-2, 4-6), would be priced out of any opportunity to participate in WMATA's construction projects.

Even more to the point, one can search the opinion below in vain for the gloss put on it by Respondents. They may feel that the wrap-up program can be maintained by having subcontractors pay insurance premiums, but the Court of Appeals has not said so, and the thrust of its opinion is to the contrary. Respondents' attempt to ameliorate the adverse impact of the ruling below by this new interpretation simply constitutes an admission that the ruling as it stands is both harsh and unworkable.

For the foregoing reasons and the reasons given in the Petition, the Petition should be granted. The deci-

sion below is also so plainly in error that the Court may wish to consider summary disposition.

Respectfully submitted,

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